

## Responsible Victims and (Partly) Justified Offenders

R. A. Duff\*

VERA BERGELSON, *VICTIMS' RIGHTS AND VICTIMS' WRONGS: COMPARATIVE LIABILITY IN CRIMINAL LAW* (Stanford University Press 2009)

If you negligently cause damage to my property, I can sue you for the cost of repairing it or replacing it. However, if you can show that my negligent conduct contributed to the causation of the damage, that will significantly affect my claim. As Vera Bergelson notes (pp. 52–56), on a draconian version of the doctrine of “contributory negligence,” it destroys my case—I can claim nothing from you. On a more plausible and less draconian version of the doctrine, as a doctrine of “comparative negligence,” it reduces the amount I can claim; I must now share the cost of the damage in proportion to my negligent contribution to it. In tort law, the victim’s conduct, in particular the victim’s faulty conduct, thus plays a crucial role in determinations of liability. In criminal law, by contrast, matters seem very different. Unless the victim’s conduct was such as to defeat the claim that the defendant caused the relevant harm, it does not qualify or undermine the defendant’s liability in the way that it can in tort law. I might have negligently or recklessly placed myself or my property at risk, but if you caused damage to me or my property, either on purpose or through your reckless conduct, you are guilty of a criminal offense, and my recklessness or negligence does not seem to defeat, or even qualify, your guilt.

One of Bergelson’s aims is to point out how misleading that familiar contrast between tort law and criminal law is by reminding us of some familiar ways in which the victim’s (or alleged victim’s) conduct can make a significant difference to the defendant’s liability. If *V* consented to what *D* did to him, or at least voluntarily assumed the risk that *D* would do that, then *D* might be entitled to a complete acquittal (or to conviction only of a lesser crime or at least to some mitigation of sentence). The same is true if *D* acted defensively to ward off *V*’s attack or if *V* provoked *D*. But her aims are more ambitious than such a reminder of familiar features of our criminal law. Bergelson also wants to explain and justify (and show the unity of) such provisions by a more general account of the ways in which victims’ conduct can affect defendants’ liability, and to ground that account in a conception of rights as essentially conditional on the right-holder’s own conduct. What makes a difference to *D*’s criminal liability in the familiar kinds of case noted above is that in each case, *V* “by his own acts, has waived or

---

\* Professor, Department of Philosophy, University of Stirling and Minnesota Law School.

reduced his right not to be harmed.” (P. 4.) Such waiving or reducing, which can be voluntary or involuntary, provides *D* with either a complete or at least a partial justification for his deed. This account, Bergelson argues, makes good and coherent sense of aspects of our existing criminal law. It also, she thinks, enables us to see how our criminal law can be improved to do justice to the difference that victims’ conduct should make to defendants’ liability.

In the course of this overall argument, we get detailed discussions of the proper contours of the defenses (consent, self-defense, and provocation) on which her account focuses; but I will focus here on the overall argument and some of the questions that it provokes.

### I. TORT LAW AND CRIMINAL LAW

First, I think we should set aside the analogy that Bergelson draws between tort law and criminal law, since it is at best unhelpful (and at worst misleading). Although, as she notes (p. 52), the distinction between tort law and criminal law is blurred by provisions for punitive damages in tort law, and compensation or restitution orders in criminal law, the basic logic of the two kinds of law differs in a way that renders them disanalogous for present purposes. In a paradigm tort law case, what is at stake is who should bear the cost of the harm or damage that has been caused—a cost that is supposed to be, at least in principle, finite and determinable. The doctrine of comparative fault holds, rather plausibly, that the cost should be allocated in proportion to the faulty contribution that each of the parties involved made to the harm: if the plaintiff’s negligence contributed to the causation of the harm, she should bear some of the cost; likewise, if more than one defendant contributed to the causation of the harm, the cost of repair or compensation should be shared between them. In this context we can properly say, with Bergelson, that it would be “unfair to assign all the responsibility for an injury to one party, the [defendant], and completely ignore the victim’s contribution,” if that contribution was itself faulty. (P. 53.) Furthermore, in this context, responsibility shared is responsibility reduced for each of those who share it: “to the extent the injurious result is attributable to an act of another, the offender should not bear responsibility for it.” (P. 54.) If you and I must share responsibility for the damage to my property, we must share the cost of repairing it; I cannot claim that you should pay the whole cost. Equally, if my car is destroyed as the result of the negligent behavior of ten other people, I am entitled to claim the full cost of replacing it from the ten of them. However, I cannot claim that each should pay the full cost; rather, each should pay one-tenth.

We can also say in the context of the criminal law that it would be unfair to assign all the responsibility for an injury to the defendant if the victim was also, at least to some degree, responsible for the harm that he suffered; but the meaning and implications of this claim are now quite different, because the responsibility at stake is now quite different. The question now is not who is or should be held liable to carry the cost of repairing the harm, but rather who is or should be held

liable to conviction and punishment for culpably causing that harm. In this context, responsibility that is shared is not thereby necessarily reduced, since it is not now responsibility as to a finite burden. If my car is destroyed by an act of criminal vandalism, it might turn out that there was just one perpetrator, who was solely responsible for destroying it, or ten, who destroyed it between them. Yet in the latter case, no one would suggest that the criminal responsibility of each perpetrator is reduced, or that each should be convicted of a lesser crime or receive a lighter sentence.

To argue or show in the context of tort law that the plaintiff was partly responsible for the harm that she suffered is thus already to argue or show that the defendant's responsibility is reduced, and that his liability—how much he should have to pay—is also reduced. To argue or show in the context of criminal law that the victim was partly responsible for the crime is not in the same way already to argue or show that the defendant's responsibility is reduced, or that his liability—the offense of which he is convicted and the punishment that he receives—should also be reduced. We need some further argument for those further claims.

Furthermore, in tort law, what seems to be crucial, on Bergelson's account, is the victim-plaintiff's fault. What reduces the defendant's responsibility is not just that the victim-plaintiff played a causal role in the occurrence of the harm, but that she was at fault in doing so.<sup>1</sup> But it is not the victim's fault that is crucial in the criminal context. This is clearest in the case of consent: whether consent negates an element of the offense, or provides a justification for its commission, its normative efficacy does not typically depend on its being wrongful or faulty. But the point also applies to self-defense, since both culpable and innocent aggressors, on Bergelson's account, waive their rights and thus justify the defender's action. (P. 72.)<sup>2</sup> An attacker might thus be free of fault, but his attack still justifies his target's use of defensive force. Only in the case of provocation, therefore, is the victim's fault crucial to the reduction of the defendant's responsibility or liability; the victim's fault does not provide a unifying rationale.

## II. RIGHT-WAIVING, CRIME AND JUSTIFICATION

Second, what does provide the unifying rationale is the suggestion that, in all three kinds of case, the (alleged) victim "has waived or reduced his right not to be harmed." (P. 4.) That waiver might be voluntary, as when the victim consents to or assumes the risk of what is done; or it might be involuntary, for instance when

---

<sup>1</sup> Although it must also be a good, and complete, defense to a claim in tort law that the plaintiff consented to what the defendant did, there are clearly plenty of other ways, beyond those involving some contributory fault, in which the plaintiff's conduct can affect the defendant's liability.

<sup>2</sup> More precisely, "aggressors who *chose* to change their moral status vis-à-vis the perpetrator" thereby waive or forfeit their rights, even if their attack was excused or justified; when the aggressor or threat lacks such power of choice, his rights are overridden rather than waived or forfeited. (P. 76.)

the victim “somehow assault[ed] an important right of the perpetrator” (p. 107), thus justifying or partly justifying the perpetrator’s action.<sup>3</sup> Now there are familiar worries about the suggestion that we can understand such justifications as self-defense in terms of a waiving of rights (some of which Bergelson addresses), but there is a particular worry about how this suggestion fits with other aspects of her account. She insists that an agent can plead justification only if she was both aware of and motivated by the factors that ground the justification (p. 63)—she must have acted “*in order to achieve* [the] better balance of harms and evils” that makes her action justifiable. (P. 93, emphasis added.) Bergelson also argues that conduct should be criminal only if it either violates the victim’s rights or disregards the victim’s dignity. (P. 67.) These three propositions, however, seem to be inconsistent. If *V* has waived his right not to be harmed in a certain way, then one who harms him in that way has not violated his rights, whether or not she knows that *V* has waived his rights, or knows the facts in virtue of which *V* counts as having waived his rights, or is motivated by any morally proper intention. If the harmer has not violated *V*’s rights, she has committed a crime only if, in acting as she did, she disregarded *V*’s dignity; but nothing in Bergelson’s discussion of dignity and how it is violated suggests that this will always be so—that I violate another’s dignity whenever I act in a way that would violate a right if she had not waived it. If by attacking you I waive my right not to be killed, then in killing me you do not violate my right, whatever you know about the situation and whatever your motives. Likewise, if by putting a television that I no longer need at the roadside I thereby waive my rights as its owner and invite anyone to take it, someone who takes it does not violate my rights, even if he thinks he is stealing it without my consent. So it seems that Bergelson cannot maintain both her account of justification and her claim that what gives *D* a defense in the cases she discusses is that *V* has waived his rights.

I think that Bergelson is right about justifications. If a liability-negating factor is properly classed as a matter of justification, rather than as negating an element of the offense, then the defendant who seeks an acquittal on the basis of that factor must adduce evidence not merely of its existence, but that she was aware of and motivated by it. But her account of the nature of crime makes the violation of rights (or dignity) an essential element of the offense itself—if *V* has waived or reduced his rights, then the offense has not been committed (or has not been committed in its most serious form), and *D* need make no claim about what she knew or what motivated her. If Bergelson is to sustain her (plausible) conception of justification, she must therefore either revise her conception of crime, and argue that I can commit a criminal wrong against *V* without infringing either his rights or his dignity (which does not look a plausible route for her to

---

<sup>3</sup> It is not entirely clear how the idea of an “involuntary” waiver or reduction of rights fits with the claim that a right is waived or forfeited only when the agent chooses “to change their moral status vis-à-vis the perpetrator” (p. 76), since a chosen change of moral status is hardly involuntary.

take), or abandon her claim that when *V*'s conduct precludes or qualifies *D*'s liability, that is because *V* "has waived or reduced his right not to be harmed." (P. 4.)

### III. WHAT RIGHTS ARE WAIVED (OR REDUCED)?

Third, there is a further, familiar puzzle about just which rights *V* should be taken to have "waived or reduced," especially in the contexts of self-defense and provocation (it is easier to work out what rights *V* has waived in the contexts of consent and assumption of risk). Take first the case in which *V*'s conduct gives *D* a complete justification for her action—a case of self-defense, for instance. If the only way in which *D* can protect herself against a murderous attack by *V* is to kill *V*, she is justified in doing that; so on Bergelson's account, *V* has waived his right not to be killed. Suppose, however, that *D* could easily defend herself by causing a harm less serious than death to *V*, either by injuring *V*, perhaps, or by damaging *V*'s property (suppose *V* is, as *D* knows, so attached to his car that *D* could divert him from his attack for long enough to make her own safe escape simply by throwing a rock at his car, for example). Under such circumstances, *D* is fully justified only in doing that lesser harm to *V*; if she kills *V*, thus using more force and causing more harm than is reasonably necessary to defend herself, she can claim only "partial justification." (P. 105.) So it seems that in this case, *V* has not waived his right not to be killed (for if he had waived it, *D* would not commit a criminal wrong in killing him); but he has waived his right not to suffer whatever harm (whatever infringement of what would have been a right had he not waived it) is reasonably necessary for *D* to cause in defending herself.

One implication of this picture is that what rights I waive by my action can depend not just on the nature of that action, but also on the circumstances that determine what must be done to frustrate my attack. If two people mount would-be murderous attacks that are similar in their culpability and seriousness, one might think that both should be taken to have waived the same rights, to the same extent; but if fortuitously, one attack could be warded off without causing fatal, or even serious, harm to the attacker, whilst the other can be warded off only by killing him, it seems that, on Bergelson's account, they have waived different rights—the latter, but not the former, has waived his right not to be killed. Perhaps, as Bergelson suggests, a suitably context-sensitive, relational account of rights would allow for this, but there is another, more serious problem about the rights that are, and those that are not, waived, and the relation between them—which is also a puzzle about what it means to "reduce" one's rights.

If *D* kills *V* when she could have warded off his attack by simply wounding him, or by damaging his car, she has presumably violated his right not to be killed—a right that he has not waived. He has waived his right not to be wounded, or not to have his property damaged; but *D*'s action does not answer to that waiving, since she does not wound him (unless death is classed as a particularly serious wound) or damage his property. On Bergelson's account, she is partly

justified in killing him. (P. 105.) But how? It must be because he has “reduced” his right(s); but what does that mean? Bergelson’s answer seems to be that he has reduced his “overall right not to be harmed,” by waiving some of the “specific rights” that constitute that overall right. (P. 91.) He has waived his specific right not to be wounded, or not to have his property damaged, and that waiving reduces the weight or value of the overall right not to be harmed. So whilst in killing him *D* does violate his right not to be killed, and thus his overall right not to be harmed, that violation constitutes a less serious wrong. But this seems a very strange picture (and it is not helpful to treat all specific rights, as Bergelson’s account seems to commit her to treating them, as instantiations of a general right not to be harmed). My right not to be killed is surely not reduced in weight or in value by my waiving my right that my property not be damaged; and even if we look only at harms of the same general type, such as bodily harms, it seems odd to suggest that in waiving my right not to be wounded I also reduce the weight or value of my right not to be killed.

Maybe a more detailed development and explication of Bergelson’s account would show either that these puzzles are not real or that they can be resolved; but the book does not offer us enough explanation to show this, and must thus leave us with the strong suspicion that we cannot explain these ways in which the victim’s conduct can affect the defendant’s liability by talking of waiving or reducing rights.

#### IV. VICTIM NEGLIGENCE AND CRIMINAL LIABILITY

Finally, can the victim’s negligence, if it contributes to the causation of the relevant harm (but not so significantly as to negate the defendant’s causal responsibility) make a difference to the defendant’s criminal liability? It is striking that whilst the issue of victim fault in tort law arises most typically when the fault consists in negligence,<sup>4</sup> Bergelson’s discussion of criminal law focuses on the difference that the alleged victim’s intentional conduct can make to the defendant’s liability. Indeed, it sometimes looks as if *only* what *V* does intentionally can affect *D*’s liability:

The victim’s conduct should mitigate the perpetrator’s liability only when the victim has waived his rights voluntarily, by consent or assumption of risk, or lost them involuntarily, by attacking or threatening some legally recognized rights of others. (P. 123.)<sup>5</sup>

---

<sup>4</sup> As in *Beul v. ASSE Int’l. Inc.*, 233 F.3d 441, 451 (7<sup>th</sup> Cir. 2000), from which she quotes the judicial claim by Judge Posner that “[v]ictim fault is not a defense, either partial or complete, to criminal liability” (P. 2.)

<sup>5</sup> She is here discussing cases in which *D* uses force against *V* in response to, or to ward off, a threat of harm that *V* creates.

For she sets tight constraints on assumption of risk: *V* can be taken to have assumed a risk of harm only if he “purposefully engage[s] in a risky activity” (p. 104), and “may not be deemed to have assumed the risk of unlawful conduct by another.” (P. 100, emphasis omitted.) We have also seen already that even involuntary right-waiving requires that *V* chose “to change [his] moral status vis-à-vis the perpetrator” (p. 76); this might cover cases in which *V*’s conduct was reckless rather than intentional, but does not capture merely negligent conduct. Now Bergelson does not actually limit involuntary right-waiving to cases in which *V* chooses to change his moral status, since she argues in the passage from which I have just quoted that *V*’s negligent risk-creation can reduce *D*’s liability (to a limited extent) when *D* uses force against *V* in response to that risk. (P. 123.) But what should we make of the familiar tort law case in which *V*’s negligence plays a casual role in the occurrence of the relevant harm—not the kind of case in which *V* creates a risk to which *D* then responds, but the kind of case in which civil courts would talk of “contributory negligence”?

Bergelson mentions this kind of case briefly, towards the end of the book: if *V* is injured or killed by *D*’s car, when *D* is drunk or speeding, *D*’s liability should be reduced if *V*’s own negligence played a significant role in the causation of the accident. (Pp. 156–57.) But how is this consistent with her account? *V* has certainly not involuntarily waived or reduced his rights, since I involuntarily waive or reduce my rights against another only if I act in a way that breaches some duty I owe her—that is, only if she has a right that I not act thus. (P. 105.) Nor does it seem that *V* has voluntarily waived or reduced his rights—he did not consent to being crashed into by *D*; in many cases we could not plausibly say that he “purposefully engage[d] in a risky activity” (p. 104) that led to the accident; and since *D*’s drunken or excessively fast driving is unlawful, *V* cannot, in any case, be taken to have assumed the risk of it.<sup>6</sup> Or should we say that what matters in such cases of recklessness or negligence is comparative causation (pp. 144–54): that the extent of *D*’s responsibility for the harm that *V* suffers is conditioned by the causal contribution that each made to the occurrence of the harm (p. 146)? But this brings us to a point noted earlier: that while in tort law responsibility shared is usually responsibility reduced for each of those who share it, the same is not true in criminal law.

There would be an interesting and striking analogy between criminal law and tort law if the victim’s faulty (reckless or negligent) conduct should mitigate the defendant’s criminal liability, as it can mitigate his civil liability; but Bergelson’s

---

<sup>6</sup> I’m taking “unlawful conduct” at face value, to cover not just intentional attacks on another, but offenses of recklessness or negligence. A narrower reading might be suggested by the passage that Bergelson quotes in support of this limitation on what risks we can be deemed to have assumed: people “must be able to assume that others will do them no intended injury” (p. 100, quoting ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 169 (1922)); so perhaps it could be said that although I cannot assume the risk that another will attack me, I can assume the risk that he will recklessly or negligently endanger me. But what would justify this narrower reading?

brief comments on this issue are apparently at odds with the core of her argument in this book, which emphasizes the victim's purposive conduct, and she does not say enough to show whether that apparent inconsistency is real or not.

There are, as Bergelson shows, important questions about the ways in which the (alleged) victim's conduct can affect the defendant's criminal liability, and about whether we can find a unitary theory to explain them all. This book proposes an ambitious unifying theory; but its argument is too often underdeveloped, and (as I have tried to indicate) has too many internal problems, to persuade us that it offers a promising route to understanding criminal liability in "comparative" terms.